

McCormick Foundation Civics Program

2010 First Amendment Summer Institute

Day Four



First Amendment Analysis

- *Cohen v. California* (1991):
 - Categorical exception?
 - Fighting words?
 - Incitement?
 - Obscenity?
 - Pure speech?
 - Speech plus?



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Freedom of Speech: Obscenity

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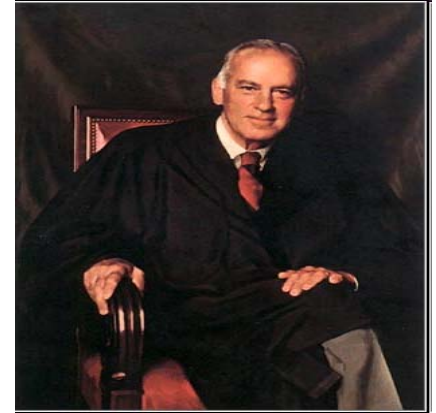
Director of Educational Programs
Civics Program



Freedom of Speech

- **First Amendment:** “Congress shall make no law...abridging...the freedom of speech...”
- **Obscenity and Pornography:** How are the two distinguished? Does the First Amendment protect both?
- **Evolving Case Law:**
 - *Regina v. Hicklin* (1868, British case): “whether the tendency of the matter...is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.”
 - *Roth v. U.S.* (1957): “Obscenity is not within the area of constitutionally protected speech...” The test followed, and read: “Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest.”

Obscenity



○ Evolving Case Law:

- *Jacobellis v. Ohio* (1964):
“I know it when I see it.”
—Justice Potter Stewart
- *Memoirs v. Massachusetts* (1966): *Memoirs of a Woman with Pleasure* was not "utterly without redeeming social value." The Court confirmed that books could not be considered obscene unless they were completely worthless, even if they possessed prurient appeal and were "patently offensive."
- *Interstate Circuit, Inc. v. Dallas* (1968): The ‘intractable obscenity problem.’—Justice John Marshall Harlan II



Obscenity Continued

○ Miller v. California (1971):

- Miller was found guilty for unsolicited mailings of pamphlets that contained pictures and drawings of men and women portrayed in sexual positions with their genitalia exposed. They stood as an advertisement for books and film that violated California's obscenity law.
- State police power applies to obscenity and pornography when:
 1. If an average person, applying community standards, would find the material appealing to a "prurient interest";
 2. If the work portrays sexual conduct in an offensive fashion in accordance with state law;
 3. And if the work lacks literary, artistic, political, or scientific value.
- Material subject to prosecution under state law includes "patently offensive representations" of sex acts, masturbation, "excretory functions," and "lewd" display of genitalia.
- Prosecution is only permitted for the "sale or exposure" of "hard-core" pornography as defined by state statute.

Obscenity Continued

○ Group Exercise:

1. Review the fact pattern of the assigned Supreme Court or federal court case and apply the three-pronged test for obscenity developed in *Miller v. California* (1971):
 - A. *Paris Adult Theater v. Slaton* (1973)
 - B. *New York v. Ferber* (1982)
 - C. *American Booksellers Association, Inc. v. Hudnut* (1985)
 - D. *Pope v. Illinois* (1987)
 - E. *National Endowment for the Arts v. Finley* (1998)
 - F. *Ashcroft v. Free Speech Coalition* (2002)
2. In what ways, if any, is the *Miller* test inappropriate for the case you are considering?
3. How might you suggest that the *Miller* test be modified?
4. Report your findings to the class

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Questions?

